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No. 07-284

In The
Supreme Court of the United States

THE STATE OF MARYLAND,

Petitioner,

vs.

JOHN AUGUST PAULINO,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Maryland

BRIEF OF AMICI CURIAE STATES OF OKLAHOMA, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, NEW HAMPSHIRE, OREGON, SOUTH CAROLINA, AND SOUTH DAKOTA IN SUPPORT OF PETITIONER, STATE OF MARYLAND

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QUESTION PRESENTED

Where the police have reason to believe that a suspect is concealing cocaine between his buttocks cheeks, is it reasonable under the Fourth Amendment for the police, at the scene of the arrest, to reach into the suspect's undershorts and seize the cocaine as a search incident to the suspect's arrest?

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STATEMENT OF AMICI INTEREST

The State of Oklahoma and the other fourteen (14) amici states joining this brief urge the Court to grant certiorari in this case in order to ensure street-level police officers are not hindered in conducting reasonable searches incident to arrest in order to protect themselves and prevent the destruction or loss of evidence. Drug trafficking and distributing are pernicious and widespread crimes which impact practically every state and community in the country. States are particularly affected by the crimes of trafficking, possession, and distribution of controlled dangerous substances.

According to the Department of Justice's Bureau of Justice Statistics, state and local law enforcement officers, as opposed to federal officials, are responsible for the vast majority of drug offense arrests. *See* Bureau of Justice Statistics, Drug and Crime Facts (last revised Sept. 21, 2006) <http://www.ojp.usdoj.gov/bjs/dcf/enforce.htm>. State and local police officers also often encounter drug traffickers and distributers who secrete relatively small but nonetheless significant amounts of drugs on or inside their bodies. One increasingly prevalent situation encountered by such officers is the concealment of drugs, especially crack cocaine, between the buttocks of street-level traffickers and distributers. This increasingly popular

mode of concealment poses threats to the preservation of evidence as well as to the safety of law enforcement officers.

The dual objectives of preserving evidence and protecting police officers are of vital interest to the states. For the states to be able to properly address these important interests, however, their police officers must have the ability to conduct appropriate searches incident to arrest at the scenes of the arrests without being hampered by arbitrary constraints such as those imposed by the Maryland Court of Appeals in the case below. Moreover, the controlling limits of the Fourth Amendment in such circumstances are unclear in light of splits among the various state and federal courts, as detailed by Maryland in its petition before this Court. These inconsistencies go not only to what actions are permissible by police officers in the line of duty but also to the determination of what constitutes a strip search or body cavity search. As such, the amici states respectfully urge this Court to grant review of the Maryland Court of Appeals' decision in order to define what constitutes a strip or body cavity search as well as to clarify the permissible limits of on-the-scene searches of arrestees.

REASONS FOR GRANTING THE WRIT

Although the Maryland Court of Appeals recognized searches incident to arrest are permissible to disarm arrestees and "search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction[,]" Pet's App. at 11a (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)), it nonetheless imposed arbitrary conditions beyond a lawful arrest that must be met before any reach-in or partial strip search incident to arrest may be initiated. These conditions include evidence that an arrestee possesses a weapon or is actively "attempting to destroy evidence" and that no members of the public, "whether their view [is] obscured or otherwise," are present in the area where the search is going to occur. Pet's App. at 24a-26a. Police officers, however, must be allowed the flexibility to conduct appropriate searches incident to arrest at the scene of the arrest, even those that require viewing some unclothed portions of arrestees' bodies, in order to protect themselves and preserve evidence. Because the opinion issued by the Maryland Court of Appeals adds to the uncertainty regarding what types of searches may be conducted incident to arrest, when they may be initiated, and where they may be accomplished, the amici states urge this Court to grant review of the case below in order to clarify these important Fourth Amendment questions.

I. Police must have the ability to conduct appropriate and reasonable searches incident to arrest at the scene of the arrest in order to prevent injury to themselves and preserve evidence.

The phenomenon of drug traffickers and distributers concealing contraband and weapons between their buttocks or inserted into body cavities is prevalent and has been noted by police officers, courts, and medical professionals. *See, e.g., U.S. v. Barnes*, 443 F.Supp.2d 248, 250-51 (D. R.I. 2006) (case involving search of suspected drug distributer "who was reputed to secrete drugs between his buttocks"); *U.S. v. Perdue*, 427 F.Supp.2d 671, 674 (W.D. Va. 2006) (crediting testimony of officer who testified that out of 300 arrests for cocaine in which he was involved, approximately 100 involved circumstances where the suspect had secreted the drugs in his buttocks or groin area); *People v. Barnville*, 819 N.Y.S.2d 234, 236 (N.Y.A.D. 1 Dept. 2006) (noting officer's testimony that often drug suspects secrete drugs in or around their buttocks); *State v. Robinson*, 2006 WL 697561 *7 (Conn. Super. 2006) (unpublished) (testimony revealed that street-level narcotics distributers often hide drugs in between the cheeks of their buttocks); *Com. v. Osborne*, 816 N.E.2d 1249, 1253 (Mass. App. Ct. 2004) (reciting testimony from a Boston police officer that, based on his training and experience, he was aware "that persons store drugs, as well as weapons, secr[eted] in this area of their body [between buttocks cheeks], to avoid detection and/or

arrest"); *State v. Mackey*, 752 N.E.2d 350, 358 (Ohio App. 2 Dist. 2001) (Grady, J., concurring) (noting that the court "has reviewed numerous cases wherein crack cocaine was located in a search that probed the area between a suspect's buttocks"); *Moss v. Com.*, 516 S.E.2d 246, 249 (Va. App. 1999) (noting officer's testimony that "certain narcotics dealers hide contraband in areas they do not believe the police will search, such as the buttocks"); S.J. Traub, R.S. Hoffman, and L.S. Nelson, *Body Packing – The Internal Concealment of Illicit Drugs*, 349 NEW ENG. J. MED. 2519, 2519 (2003) (noting that body packing includes swallowing as well as inserting into the rectum or vagina packages of illicit drugs and is becoming increasingly popular); G.M. Jones and B.A. Shorey, *Body-Packers: Grading of Risk as a Guide to Management and Intervention*, 84 ANN. R. COLL. SURG. ENGL. 131, 131 (2002) (drug traffickers may conceal contraband in the body by swallowing it or inserting it into rectum or vagina).

As with the concealment and transportation of drugs between one's buttocks, authorities have observed that weapons, too, may be hidden in like manner. *See, e.g., State v. Gillis*, 2007 WL 1953679 *5 (Ohio App. 2 Dist. 2007) (unpublished) (noting that "[a]lthough weapons may not commonly be located in the buttocks area, some legitimate concern was established by the testimony [in the case, that it is possible to conceal a weapon in the buttocks]"); *Osborne*, 816 N.E.2d at 1253 (reciting officer's testimony that drugs as well as weapons can be hidden

between a suspect's buttocks); *Wright v. Bennett*, 2003 WL 1964063 *1 (S.D.N.Y. 2003) (unpublished) (case in which inmate was found to have a razor blade concealed in his buttocks); *Aguilar v. State*, 594 A.2d 1167, 1169-73 (Md. App. 1991) (noting testimony from officer that drug suspects often carry weapons in their pants and underwear and that such weapons may not be detected during a pat-down).

When police officers are unreasonably inhibited by court decisions from conducting reasonable searches incident to arrest, their abilities to protect themselves and preserve evidence are likewise diminished. Precluding officers from conducting appropriate reach-in or partial strip searches at the scenes of arrests simply encourages more drug traffickers and distributers to carry their wares and weapons secreted in their buttocks and surrounding areas because such law breakers anticipate that they will be able to avoid immediate searches of those areas and, thus, may have further opportunities to dispose of their contraband even after an arrest. These opportunities present themselves at the scene of the arrest, during transportation to a police facility, and even while at such facilities. For example, a suspect in a Texas case was arrested, handcuffed, and put into a police vehicle for transportation to a police station. *Shepard v. State*, 2006 WL 903728 *1-2 (Tex. App.–Austin 2006) (unpublished). While being transported, the suspect repeatedly turned in the seat and moved his hands, which were cuffed behind his back, despite being instructed to sit facing forward with his body

against the back of the seat. *Id.* The officer and suspect arrived at the station, where the suspect was removed from the vehicle and taken inside. *Id.* Sometime later, one of the officers involved in the arrest went back to the police vehicle and discovered a large sandwich bag containing several rock-like objects lying at the back portion of the seat where the suspect had been sitting. *Id.* The baggie had not been there before the suspect was placed in the vehicle. *Id.* The officer that transported the suspect testified that suspects often hide drugs between their buttocks or near their rectums and that the suspect in this case had sufficient freedom of movement, despite being handcuffed, that he would have been able to retrieve drugs from his underwear or buttocks and dispose of them in the police vehicle. *Id.*

As another example, a suspect who was arrested, handcuffed, and seated on the ground near a police vehicle while officers searched the car he had been driving, managed to pull what appeared to be a block of crack cocaine from his pants and stash it under the police vehicle. *U.S. v. Bazy*, 1994 WL 539300 *3 (D. Kan. 1994) (unpublished). Although the attempts to dispose of contraband were discovered in both of these cases, they nonetheless illustrate the real possibility that arrestees can and will dispose of evidence secreted in their buttocks areas even after having been arrested and restrained and that such attempts at disposal or destruction will not always be discovered. Moreover, these suspects' actions also show that an arrestee who had a weapon between his

buttocks could access and brandish the same despite being handcuffed and in police custody. Clearly, the concerns for officer safety and preservation of evidence in such cases are not merely theoretical.

In addition, several cases show that individuals who have contraband secreted in their buttocks often resort to trying to insert such contraband into their rectums or other body orifices in attempts to further dispose of or destroy the evidence after being arrested. For instance, a defendant in a Virginia case was observed conducting drug transactions, repeatedly reaching into the "crotch area" of his pants while dispensing cocaine to his customers. *Taylor v. Com.*, 2001 WL 604377 *1 (Va. App. 2001) (unpublished). After being arrested, police conducted a brief pat-down search of the defendant which yielded no contraband. *Id.* The defendant was then handcuffed, put into a police car, and transported to the police station. *Id.* While in the police car and later at the station, the defendant was seen to be moving around, sitting on his hands, and squirming in his chair. *Id.* Officers then conducted a strip search of the defendant followed by a body cavity search which showed the defendant had inserted what appeared to be a baggie of crack cocaine into his anus. *Id.* In a similar case from Kansas, a pair of defendants were detained on the side of the road while officers searched their vehicle. *Bazy*, 1994 WL 539300 at *3. Though handcuffed, both suspects repeatedly moved around and squirmed as they sat on the ground. *Id.* A subsequent strip search of the suspects showed that each had

drugs secreted in their underwear and that one had managed to partially insert the drugs into his rectum while the other had drugs concealed near his scrotum. *Id.* Another case, this time from Washington, D.C., also illustrates this phenomenon. *U.S. v. Murray*, 22 F.3d 1185 (table), 1994 WL 119009 (D.C. Cir. 1994) (unpublished). A suspect was arrested by police after they observed him dealing drugs and placing them inside the rear of his pants. *Id.* When police started to search him incident to his arrest in the area they saw him put the drugs, the suspect began resisting the police in such a way that police believed he was trying to push the drugs "deep into his buttocks area." *Id.* After subduing the suspect, police found a baggie of crack cocaine in between the cheeks of his buttocks. *Id.* As these cases illustrate, the concern about the destruction or loss of evidence in such circumstances is a real one.

Police officers must have the flexibility to conduct appropriate searches incident to arrest at the scene of arrest, even those that require some manipulation of an arrestee's clothing, in order to protect the states' interests in protecting the safety of law enforcement officers and preserving evidence from disposal or destruction. By inhibiting officers' abilities to conduct appropriate searches in furtherance of these worthy goals, the Maryland court's decision actually encourages more would-be law breakers to hide weapons or drugs in their buttocks or similar areas because they now have an expectancy that they will be protected from at least an immediate search of such areas, even

incident to a lawful arrest, and, therefore, will have further opportunities to dispose of or destroy their contraband sometime post-arrest. Because such a result is antithetical to a common sense application of the Fourth Amendment, the amici states urge this Court to grant certiorari review in this instance.

II. Police need "a single, familiar standard" without "subtle nuances and hairline distinctions" to guide their searches, especially in the context of narcotics arrests.

In 1981, this Court noted that Fourth Amendment doctrine should be expressed in readily applicable terms, not by rules with "subtle nuances and hairline distinctions." *New York v. Belton*, 453 U.S. 454, 458 (1981) (internal citation omitted). Therefore, this Court indicated that "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.* (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)). As fully discussed in Maryland's petition, the Fourth Amendment doctrine at issue in this case is confused and fractious and the decision in the case below only furthers the confusion. Instead of promoting "a single, familiar standard" by which street-level police officers can be guided, the Maryland Court of Appeals has added to the conflicts surrounding what constitutes a strip or body cavity search, what factors must be present to authorize a warrantless strip or body

cavity search, and whether such a search of an arrestee may ever be conducted at the scene of the arrest.

Thus, the case below is not unlike the case of *Brigham City, Utah, v. Stuart*, ___ U.S. ___, 126 S.Ct. 1943, 1947 (2006), which involved conflicts regarding "the appropriate Fourth Amendment standard governing warrantless entry by law enforcement in an emergency situation." As in that case, where the determination of what constituted exigent circumstances that would make a warrantless entry into a dwelling house reasonable varied drastically depending on which court one was in, the case below presents a similar situation of disparate standards for determining what is a strip or body cavity search and when and how such searches may be conducted. Because, in order to effectively perform their duties to protect society and enforce the law, police officers need clear and easily applicable standards by which to gauge their conduct during searches incident to arrest, the amici states respectfully urge this Court to grant certiorari review of the Maryland Court of Appeals' decision so as to provide clarification on these important Fourth Amendment issues.

CONCLUSION

For the reasons stated above, the amici states respectfully request this Court grant the petition for writ of certiorari.

Respectfully submitted,

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